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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
WESTMARK HOTELS, INC.,)
)
Contestant.)

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Law Offices of Robert W. Landau

Docket No. 91-867
Inspection No. Mi-2597-011-91

DECISION AND ORDER

This matter arises from an occupational safety inspection conducted by the State of Alaska, Department of Labor (Department) at the Westmark Kodiak hotel on January 29, 1991.

As a result of the inspection, the Department issued two citations to Westmark Hotels, Inc. (Westmark) alleging violations of occupational safety and health codes. Westmark contested Citation 1 only. Citation 1 alleges a violation of Electrical Code 03.002(b)(1)(G) for installing a garbage disposal start/stop switch in an unsafe location. The violation was classified as "serious" and a monetary penalty of \$300 was assessed.

Pursuant to Westmark's contest of Citation 1, a hearing was held before the Board in Kodiak on October 16, 1991. Both

parties presented witness testimony, documentary evidence and arguments. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On January 29, 1991, Department compliance officer Sharon Miller conducted an occupational safety inspection of the Westmark Kodiak hotel in Kodiak, Alaska.

2. Miller has been a safety compliance officer for approximately one year and previously worked as an electrician for 13 years. She is a certified journeyman electrician.

3. During Miller's inspection of the hotel kitchen, she observed the start/stop switch for the garbage disposal next to the dishwashing machine. The switch was operated by a handle with a knob on the end that protruded approximately three inches beyond the leading edge of the dish table. See Exhibits 1 and 2.

4. Miller learned that kitchen staff employees were concerned that the protruding knob of the garbage disposal switch could be inadvertently bumped, causing the disposal to operate and potentially injuring anyone with his hand in the disposal. The employees' concern had been raised at safety meetings prior to the inspection but no action had been taken by the hotel.

5. Many of the kitchen employees are relatively inexperienced and unskilled workers; some also are not native

English speakers and sometimes have difficulty understanding English.

6. The garbage disposal was manufactured by In-Sink-Erator and was installed in the Westmark Kodiak kitchen approximately seven years ago. The disposal and the switch were installed by the hotel's contractor, S.E. Rykoff and Company of Seattle. In a letter to Westmark dated March 22, 1991, the contractor's general manager stated that the switch had been installed as recommended by the manufacturer's specification sheets. See Exhibit R. The letter further stated that all disposal manufacturers "recommend the switch be located adjacent to the unit under the leading edge of the dish table." The installation diagrams accompanying the letter show a pushbutton-type start/stop switch mounted under the leading edge of the dish table.

7. The garbage disposal at the Westmark Kodiak has an opening of approximately 3-4 inches in diameter for the entry of food wastes. It is not unusual for kitchen utensils and other small items to fall into the disposal chamber where they must be retrieved by hand. The instruction manuals for commercial garbage disposals of this type generally warn users not to put their hands inside the disposal chamber without first shutting off the machine. However, on the Westmark Kodiak disposal, there was no "lock-out" device to prevent inadvertent operation of the disposal.

8. If the disposal were to be inadvertently operated while an employee had his hand inside the disposal chamber (e.g.,

to retrieve a utensil), it is likely that the employee would receive bruises and cuts to his fingers. There was no evidence, however, that any accident involving the disposal could result in serious bodily injury or death.

9. The In-Sink-Erator garbage disposal unit bears the seal of Underwriters Laboratories, an independent agency that certifies the safe manufacture of equipment. However, the certification by Underwriters Laboratories relates only to the manufacture of the disposal and not to the installation or location of the switch. Likewise, the disposal carries the seal of the National Association of Food Equipment Manufacturers but there is no evidence that such organization (or any other similar organization) has specifically approved the method of installation used at the Westmark Kodiak.

10. Westmark representatives testified that virtually all of their hotel kitchen garbage disposal switches are located in the same place as at the Westmark Kodiak. The photographs of other installations supplied by Westmark show both pushbutton-type switches and knob-type switches. See Exhibits A, B, D and O. In none of these other installations, however, does the switch handle protrude out from under the dish table in the same manner as the switch at the Westmark Kodiak.

11. Westmark representatives testified that an employee at the Westmark Cape Fox in Ketchikan recently cut his finger as a result of inadvertent operation of a garbage disposal similar to the one at the Westmark Kodiak. After the accident, Westmark put

a protective shield over the switch to prevent accidental operation. Compliance officer Miller testified that this would have been a satisfactory method at the Westmark Kodiak; alternatively, the hotel could simply relocate the knob to avoid its protruding out from under the dish table. Another option would be to use a pushbutton-type switch that would lessen the risk of inadvertent operation.

12. Miller advised Westmark's management of her concern that the switch was installed in an unsafe location. In response, Westmark simply rotated the switch box so that the knob handle did not protrude outward from under the dish table but instead was entirely under the leading edge of the dish table. This alteration took approximately 30 minutes and involved no material costs. Westmark believes, however, that the relocated switch is less safe now than before because the disposal operator cannot reach the knob handle quite as easily.

13. There is no evidence that the Westmark Kodiak kitchen had been previously inspected by the Department's OSH section or any other occupational safety and health agency. A previous OSH inspection of the hotel involved only roofing and did not include the kitchen area.

14. Westmark representatives testified that the disposal had been inspected by the local electrical inspector after its installation seven years ago but that no problem with the switch had been mentioned.

15. The Department believed that an accident involving the disposal could result in serious bodily harm or death. Accordingly, the violation was classified as "serious" and a monetary penalty was assessed. Westmark was given penalty credit of 30 percent for company size, 30 percent for good faith in promptly correcting the violation, and 10 percent for no prior history of occupational safety violations. As a result, the final penalty assessed by the Department was \$300.

CONCLUSIONS OF LAW

Electrical Code 03.002(b)(1)(G) provides:

(b) Examination, installation, and use of equipment.

(1) Examination. Electrical equipment shall be free from recognized hazards that are likely to cause any injury or death to employees. Safety of equipment shall be determined using the following considerations:

...

(G) Other factors which contribute to the practical safeguarding of employees using or likely to come in contact with the equipment.

We must first determine whether the garbage disposal switch constitutes a "recognized hazard." It is undisputed that the knob handle on the switch protruded approximately three inches beyond the leading edge of the dish table. While we have no concern about the general location of the switch box, we believe that the placement of the knob handle significantly increased the risk that an employee working in the dishwashing area (or another co-worker) might accidentally bump into the switch handle and

inadvertently operate the disposal. We find it significant that kitchen employees had recognized the hazardous location of the switch handle and had brought it to management's attention at safety meetings.

Furthermore, we have found nothing in the installation guidelines or instruction manuals offered by Westmark that allows or authorizes placement of a switch handle that protrudes from under the dish table. In fact, it appears that the manufacturer's installation guidelines recommend that the switch be located under the leading edge of the dish table, presumably meaning the entire switch assembly, including the knob handle. See Exhibit R. Taking the foregoing factors into account, we believe that the protruding knob handle constituted a "recognized hazard."

We must next determine whether the hazard was "likely to cause any injury or death to employees." We note that employees regularly must insert their hands into the disposal chamber to remove utensils or other items. Moreover, there is no lock-out device to prevent accidental operation while an employee's hand is in the disposal chamber. We also note that at least some of the kitchen employees are inexperienced and have a problem with English. Further, Westmark acknowledged that an employee had cut his finger in the same kind of disposal at the Westmark Cape Fox after inadvertent operation of the disposal. This evidence compels us to conclude that there is a significant likelihood for injury to an employee from inadvertent operation of the disposal.

Next, we must decide whether the violation was properly classified as "serious," justifying the imposition of a monetary penalty. Under AS 18.60.095 of the Alaska OSHA Act, a serious violation exists if the violation creates in the place of employment a substantial probability of "death or serious physical harm." However, the only evidence regarding potential injuries indicated that bruised knuckles and/or cut fingers might result. Westmark's contractor for the installation of the disposal stated that in over 40 years in the food service equipment industry, he was not aware of any more serious injuries involving garbage disposals. While we believe a hazard existed and that an injury could result, we conclude there is insufficient evidence to demonstrate that any resulting injury might be serious. Therefore, we believe the violation should have been classified as "other than serious" with no monetary penalty.

Westmark made a number of arguments that by way of affirmative defenses which we conclude are without merit. First, Westmark stated that the local electrical inspector had examined the installation but had not noted any problem with the disposal switch and therefore the switch should be "grandfathered." There is no evidence, however, that the hotel kitchen was inspected previously by occupational safety and health inspectors who have a different mission and use different codes than a local electrical inspector. Nor does the electrical code provide "grandfather rights" for older installations or equipment.

Second, Westmark argues that a warning would have been more appropriate than a safety citation. The OSHA law, however, does not provide for warnings other than notification of minor (de minimis) violations which have no direct relation to employee safety or health. Because we conclude that this violation does have a potential impact on employee safety and health, a minor violation notice or warning would not have been appropriate or authorized by law.

Finally, Westmark suggests that the relocated knob handle on the disposal switch is now less safe than before because it is harder for the operator to reach. While it may be true that the relocated switch is less convenient to operate, we do not agree that it is less safe. It is not uncommon for an employer to be faced with a choice between convenience and safety; when such a choice presents itself, the OSHA law requires that safety be considered first even if the resulting condition is less convenient for employers or employees.

Despite our findings and conclusions in this matter, we wish to commend Westmark for its good faith, candor and generally positive approach to employee safety at its hotels. We note that Westmark promptly abated the disposal hazard after it was brought to their attention by the compliance officer. By all accounts, abatement of the hazard was relatively simple and inexpensive. We hope and expect that Westmark will evaluate disposal switches at its other hotels in Alaska and take appropriate corrective actions as necessary.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board orders that Citation 1 be AFFIRMED as an "other than serious" violation with no monetary penalty.

DATED this 12th day of December, 1991.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: _____

Donald F. Hoffer
Donald F. Hoffer, Jr.

By: _____

Lawrence D. Weiss
Lawrence D. Weiss